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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Petitioners,

-vs-

JOHN HARVEY ADAMSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals -- which admitted that this Court's decisions in Walton v. Arizona, 497 U.S. ___, 110 S. Ct. 3047 (1990), and Lewis v. Jeffers, 497 U.S. ___, 110 S. Ct. 3092 (1990), have reversed its holding on the constitutionality of the Arizona death penalty statute -- abuse its discretion by refusing to stay the mandate to consider supervening, controlling precedent from this Court?

2. If new controlling precedent -- Teague v. Lane, 489 U.S. 288 (1989), and Alabama v. Smith, 490 U.S. 794 (1989) -- were properly applied to this case, would that precedent require affirmance of the district court's denial of habeas corpus relief to John Harvey Adamson?

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OPINION BELOW

Looking at this case for the third time, the limited en banc panel, with three dissenters, held: (1) there were no exceptional circumstances to justify staying the mandate so that the full court could examine the case; (2) new precedent from this Court, including Alabama v. Smith, 490 U.S. 794 (1989), would not change the result; and (3) it was "not appropriate" to consider Teague v. Lane, 489 U.S. 288 (1989), as an exceptional circumstance to justify a stay of the mandate. (Appendix A.)

STATEMENT OF JURISDICTION

On May 21, 1984, John Harvey Adamson appealed the order of the United States District Court for the District of Arizona denying his application for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

On December 22, 1988, the Ninth Circuit, with four dissenters, granted Adamson relief in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). That court stayed the mandate while Petitioners sought review from this Court. With three Justices voting to grant certiorari and two not participating, this Court denied certiorari on June 28, 1990 in Lewis v. Adamson, ___ U.S. ___, 110 S. Ct. 3287 (1990). On the basis of new, controlling precedent from this Court, the State moved to continue the stay of the

mandate, and petitioned for rehearing and rehearing before the full Ninth Circuit. That court ordered supplemental briefs and heard oral argument on November 13, 1990.

The Ninth Circuit entered its opinion denying the motion to stay the mandate on January 30, 1992. On February 13, Petitioners filed a timely petition for rehearing, suggestion for rehearing en banc, and motion to circulate to the full court the suggestion for rehearing en banc. The Ninth Circuit has never ruled on those motions, but issued the mandate on February 18. This petition for certiorari is timely filed within 90 days of the Ninth Circuit's opinion of January 30.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 1.

STATEMENT OF FACTS

On June 2, 1976, John Harvey Adamson attached an explosive device to the underside of the driver's seat of newspaper reporter Don Bolles' Datsun while Bolles was in the Clarendon House Hotel. Adamson had lured Bolles there by promising to give Bolles investigative leads in a case. When Bolles left the hotel and backed his car out of the space, the bomb was detonated. The explosion literally tore Bolles apart. He lingered for 9 days during which time three of his limbs were amputated. Before dying, he identified a picture of Adamson as the man who made the appointment to meet him at the Clarendon House.

On January 15, 1977, while a jury was being chosen to try Adamson for first-degree murder, Adamson, counseled by three attorneys, entered into a plea agreement. The State accepted a plea to

second-degree murder with a stipulated actual sentence of 20 years 21 months. The plea agreement contained provisions stating that if Adamson breached the agreement, the original charge would be automatically reinstated and the parties would be back in their original posture before the plea. The agreement stipulated that if Adamson was found guilty of first-degree murder after a breach, he would be subject to the death penalty or life imprisonment. The trial judge found that Adamson knowingly, intelligently, and voluntarily entered into that agreement and the trial judge accepted it. Later that same year, Adamson's testimony helped convict Max Dunlap and James Robison of the murder of Don Bolles.

In early 1980, the Arizona Supreme Court reversed the convictions of Dunlap and Robison. As retrial rapidly approached, Adamson's attorneys wrote the

Attorney General that he would not testify at a retrial unless the State acceded to his new list of "non-negotiable demands." The letter acknowledged that the State would probably consider this refusal a breach of the plea agreement, and that Adamson was aware that a breach of the agreement by him meant that the State could prosecute him for first-degree murder and that a death penalty was possible.

True to his word, Adamson refused to cooperate, and the original murder charge was reinstated. Adamson filed a special action in the Arizona Supreme Court seeking dismissal of the murder charge, but that court held that Adamson had breached the plea agreement, waived double jeopardy by the express terms of the agreement, and that the State could proceed with prosecution upon the original charge. Adamson then sought relief in the federal district court but

was unsuccessful. He was also unsuccessful before a panel of the Ninth Circuit, which affirmed the district court's denial of relief in a memorandum decision in 1981 upon the double jeopardy issue.

A jury convicted Adamson in October 1980 of the first-degree murder of Don Bolles. Finding two aggravating circumstances and insubstantial mitigation, the trial court imposed death. The Arizona Supreme Court affirmed. State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, 464 U.S. 865 (1983). Adamson again sought federal habeas corpus relief. The district court denied his petition and a panel of the Ninth Circuit affirmed in Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985). Granting his motion for rehearing en banc, the limited en banc court, with four dissents, reversed upon the double jeopardy issue, settled since 1981, and

reserved ruling upon the other points. This Court reversed the limited en banc court's ruling. Ricketts v. Adamson, 483 U.S. 1, 107 S. Ct. 2680 (1987). Upon remand, seven of the 11 judges of the en banc court granted relief upon five of the six issues reserved in 1986. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). The State moved for rehearing, which the Ninth Circuit denied February 1, 1989.

On March 20, 1989, Arizona sought certiorari. The Ninth Circuit stayed the mandate. While that petition was pending, this Court decided Walton v. Arizona, 497 U.S. ___, 110 S. Ct. 3047 (1990), and Lewis v. Jeffers, 497 U.S. __, 110 S. Ct. 3092 (1990). Justice White specifically noted in Walton that this Court granted certiorari because Walton relied upon exactly the same arguments accepted by the Ninth Circuit in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir.

1988) (en banc), to strike down the Arizona death penalty statute as unconstitutional. Walton v. Arizona, 110 S. Ct. at 3054. This Court held that the Arizona statute was constitutional. Id. at 3054-58. That ruling eliminated three of the five reasons given by the Ninth Circuit in December 1988 for granting Adamson relief.

The same day Walton was decided, this Court in Lewis v. Jeffers, a companion case from Arizona on collateral review, severely limited federal review of Arizona's especially heinous, cruel or depraved aggravating circumstance, which the Court upheld in Walton.

The next day, June 28, 1990, this Court, with Justices O'Connor and Kennedy not participating, voted four to three to deny Arizona's petition for certiorari from the Ninth Circuit's December 1988 limited en banc decision. Lewis v. Adamson, ___ U.S. ___, 110 S. Ct. 3287

(1990). The Chief Justice, Justice White, and Justice Scalia voted to grant the petition, to vacate the judgment and to remand the case to the Ninth Circuit for further consideration in light of Walton, Jeffers, and Alabama v. Smith. Id.

Prior to the issuance of the mandate by the Ninth Circuit, Petitioners filed a motion to continue the stay of the mandate, a petition for rehearing, a suggestion for rehearing en banc, and a motion to circulate the petition for rehearing before the full court. (Appendix A at 8, 15-16.)

In response to these motions, the Ninth Circuit issued an order on September 18, 1990. (Appendix B). That order recognized that the Ninth Circuit had the power to recall the mandate (it had never issued in this case) "to prevent injustice or to protect the integrity of its process . . . ." (Id.) That order

directed the parties to address the question whether the circumstances of this case warranted such action and stated the following:

> The briefs should also address the effect that the pertinent recent Supreme Court rulings may have upon the issues in this case.

In response to that order, the parties filed supplemental briefs. Petitioners' brief discussed the application of Walton, Jeffers, and Alabama v. Smith. (Appendix C.) In addition, Petitioners argued at length that the Ninth Circuit's rulings about prosecutorial vindictiveness and judicial arbitrariness were "new rules" not dictated by existing precedent, and violated this Court's prohibition in Teague v. Lane against the creation or application of new rules on collateral review. (Id. at 25-55.) The Ninth Circuit heard oral argument on November 13, 1990. (Appendix B.)

After the Ninth Circuit heard oral argument, the trial division of Petitioners' office entered into a "Stipulation and Cooperation Agreement" with Adamson. The agreement provided that, if Adamson cooperated with the State and at all times provided complete and truthful testimony in the prosecution of the 1976 Don Bolles murder case, the State would join with Adamson in requesting that the superior court reactivate Adamson's original plea agreement, in which he pled to second-degree murder and a stipulated term of years. (Appendix A at 16-19.) The Maricopa Superior Court approved the agreement on February 1, 1991. (Id.) On the basis of the new "Stipulation and Cooperation Agreement," Petitioners filed a motion in the Ninth Circuit to vacate its 1988 decision as moot. (Appendix D.)

On January 30, 1992, the Ninth Circuit issued its latest opinion in this case. It chose to treat the State's petition for rehearing and suggestion for rehearing en banc as a motion to stay the mandate. That court denied the motion to vacate the judgment as moot "because all of the conditions precedent to the vacation of Adamson's death sentence have not been fulfilled." (Appendix A at 16-19.) The Ninth Circuit conceded that Walton and Jeffers "overrule in some respects our en banc rulings in Adamson on the issues regarding the overall constitutionality of Arizona's statute . . . ." (Id. at 26.) With three dissenters, that court said that Alabama v. Smith, which involved the setting aside of a plea agreement and a harsher sentence after trial, was not applicable to Adamson because Smith was not a capital case. (Id. at 27-28.)

However, the most puzzling part of the Ninth Circuit's ruling was its refusal to consider the effect of Teague v. Lane upon the only two grounds left for granting relief:

> The state urges us for the first time in its brief on this motion that exceptional circumstances exist to allow staying the mandate and reconsideration of our en banc decision because of the nonretroactivity principles announced in Teague v. Lane, 489 U.S. 288, 295-96 (1989), and first applied to death penalty cases in Penry v. Lynaugh, 492 U.S. 302, 314-15 (1989). The State maintains that the en banc rulings on prosecutorial vindictiveness and judicial arbitrariness are "new rules" within the ambit of Teague and Penry. The Teague issue, decided shortly after our denial of the State's first petition for rehearing, was not even raised by the State in its petition for certiorari before the Supreme Court. This contention is not appropriate to be raised at this late stage as an exceptional circumstance to justify a stay of the mandate to consider that issue.

Adamson v. Lewis, No. 84-2069 (9th Cir., Jan. 30, 1992) (emphasis supplied). (Appendix A at 30-31.) The Ninth Circuit did not say, and could not say,

that Petitioners had waived the Teague argument because Teague was not decided until after the Ninth Circuit denied Petitioners' first petition for rehearing on February 1, 1989. Having received full briefing on the Teague issue, and having heard oral argument on November 13, 1990, the Ninth Circuit simply ignored Teague v. Lane.

Noting the "unique procedural history of this case," the three dissenters (Judges Brunetti, Alarcon and Beezer) felt that exceptional circumstances did warrant staying the mandate to allow the full court to review the case:

> Although three of the Justices considering the petition specifically stated that they "would grant the petition for a writ of certiorari, vacate the judgment and remand[] the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of" Lewis, Walton, and Smith, Arizona failed to garner the four votes necessary for the petition to be granted. Id. Considering the Court's posture in Lewis, Walton, and Smith, the failure to grant the

> petition appears to have resulted solely from the absence of the participation of Justices O'Connor and Kennedy in the process. Consequently, there is an unfortunate and irreconcilable conflict between Adamson and Lewis, Walton, and Smith, which would not exist if the analysis in my dissent had prevailed.
>
> This unusual circumstance justifies recalling the mandate and reconsidering our decision. The judicial power is vested in the Supreme Court first and we are an inferior court bound to follow its dictates. U.S. Const., art. III, § 1. The actions of the Court following our Adamson en banc decisions should cause us to question whether we correctly applied the law. We have an opportunity to do so, and at least three of the Justices believe it is necessary. The rare posture of this case is exceptional enough for us to take the severe step of recalling the mandate.

Adamson v. Lewis, No. 84-2069 (9th Cir., Jan. 30, 1992). (Appendix A at 36-38.)

. . . .

. . . .

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT HAS ABUSED ITS DISCRETION BY REFUSING TO STAY THE MANDATE TO APPLY NEW, CONTROLLING LAW FROM THIS COURT THAT WOULD REQUIRE AFFIRMANCE OF THE DISTRICT COURT'S DENIAL OF RELIEF.

A.

Power to Stay or Recall the Mandate.

A federal appellate court's power to recall the mandate emanates, not from the Federal Rules of Civil Procedure, but from the inherent power of the court to correct or modify a decision for good cause. Dilley v. Alexander, 627 F.2d 407 (D.C. Cir. 1980). A supervening change in the law is a valid reason for staying or recalling the mandate. Jenkins v. Beech Aircraft Corp., 745 F.2d 1330 (11th Cir. 1984). This Court has recognized that, even when the mandate has issued, final judgments are not "completely immune from impeachment . . . ." Hazel-Atlas Co. v. Hartford Co., 322 U.S.

238, 244 (1944). Although finality in litigation is a laudable goal, federal courts have acknowledged that when a subsequent decision by this Court shows that the lower court's judgment "was demonstrably wrong," a motion to recall the mandate (or, respondents contend, to stay it), may be entertained. Legate v. Maloney, 348 F.2d 164, 166 (1st Cir. 1965).

The Third Circuit Court of Appeals has provided an excellent example of prudent exercise of this inherent power in American Iron and Steel Institute v. E.P.A., 560 F.2d 589 (3d Cir. 1977). The Third Circuit ruled against the Environmental Protection Agency on November 7, 1975. Id. at 590-91. The EPA did not file a petition for rehearing. Id. at 600. However, on February 23, 1977, this Court decided E.I. duPont de Nemours and Company v. Train, 430 U.S. 112 (1977), which

interpreted the EPA's authority to promulgate regulations under the Federal Water Pollution Control Act of 1972. Id. at 591-92. Relying on E.I. duPont, the EPA moved on March 22, 1977, more than a year after the mandate had issued, to recall the mandate and to amend the judgment. Id. at 600. After discussing the reasons that may justify taking such extraordinary steps, the Third Circuit recalled the mandate and amended its judgment after considering this Court's holding in E.I. duPont. Id. at 600.

Citing American Iron and Steel, the Ninth Circuit has exercised its power to recall the mandate and amend the judgment:

> When a decision of the Supreme Court "departs in some pivotal aspects" from a decision of a federal appeals court, recall of a mandate may be warranted to the extent necessary "to protect the integrity" of the court of appeals' prior judgment. American Iron and Steel, 560 F.2d at 596. Modification of a prior judgment also promotes uniformity in judicial decisionmaking and in the

> treatment of litigants. Id. at 597-98.

Zipfel v. Halliburton Co., 861 F.2d 565, 567-68 (9th Cir. 1988).

In Verrilli v. City of Concord, 557 F.2d 664 (9th Cir. 1977), the Ninth Circuit filed its opinion on January 3, 1977. One part of that opinion remanded the case to the district court for redetermination of a possible award of attorney's fees to Verrilli if he could prove the existence of bad faith on the part of his adversary. Id. at 665. Neither the Ninth Circuit nor the parties noticed that the Civil Rights Attorney's Fees Act of 1976 became law on October 19, 1976 -- while Verrilli's case was still pending appeal. Id. Verrilli sought recall of the mandate on the basis of the Attorney's Fees Act. Id. The Ninth Circuit recalled the mandate and said:

> Because of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice, we act to free the hand of the district court from any strictures of the "law of the case" on the former remand.

Verrilli v. City of Concord, 557 F.2d at 665 (emphasis supplied).

It was perfectly clear to three members of the limited en banc panel in this case that Walton, Jeffers, and Smith are totally contrary to the Ninth Circuit's holdings in this matter, i.e., the Ninth Circuit was "demonstrably wrong" in its rulings. In particular, the Ninth Circuit's refusal to even consider Teague v. Lane cannot be squared with the language in Verrilli about an "overpowering sense of fairness." There was nothing fair in the Ninth Circuit's refusal to stay the mandate to permit the full court to consider these new cases -- and Petitioners believe that the State is entitled to fair treatment also.

Petitioners emphasize that the Ninth Circuit did not say that Teague would not change the result, rather that court ignored Teague as "not appropriate to be raised at this late stage . . . ." Adamson v. Lewis, No. 84-2069 (9th Cir., Jan. 30, 1992), at 952. (Appendix A.)

If the award of attorney's fees is sufficient reason to recall the mandate and amend the judgment, surely controlling precedent from this Court that would change the result in a death penalty case if applied, should be ample grounds for staying the mandate to allow the full Ninth Circuit to consider the new precedent. The Ninth Circuit has abused its discretion by refusing to consider and apply law from this Court. That refusal is in contravention of its role as an inferior court under Article III of the Constitution. Adamson v. Lewis, No. 84-2069 (Jan. 30, 1992), at 955. (Appendix A.) Only this Court has

the authority to correct that abuse of discretion.

II

NEW CONTROLLING PRECEDENT FROM THIS COURT WOULD PRODUCE A DIFFERENT RESULT.

A.

Teague v. Lane and Its Progeny.

The watershed case that announced the "new rule" limitation, and forbad its application to collateral proceedings, was Teague v. Lane, 489 U.S. 288 (1989), decided 2 weeks after the Ninth Circuit denied Petitioners' original motion for rehearing. Teague asked this Court to extend the fair cross-section requirement of Taylor v. Louisiana, 419 U.S. 522 (1975), to the petit jury. Before announcing a new rule, this Court said it had to determine whether such a rule would apply retroactively. 489 U.S. at 300-01. Then the Court said what it meant by a "new rule":

> In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

489 U.S. at 301 (emphasis in original).

Adopting Justice Harlan's view of retroactivity for cases on collateral review, this Court held that it would not apply new constitutional rules of criminal procedure to cases that had become final unless the new rule fit into one of two exceptions. The first exception is a new rule that places certain kinds of primary, private individual conduct beyond the power of the law-making authority to proscribe. 489 U.S. at 311. The second exception, which concerns those procedures "implicit in the concept of ordered liberty," this Court adopted with a modification:

> We believe it desirable to combine the accuracy element of

> the Desist version of the second exception with the Mackey requirement that the procedure at issue must implicate the fundamental fairness of the trial.
>
> . . . .
>
> Moreover, since Mackey was decided, our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review.
>
> . . . .
>
> Finally, we believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.
>
> Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.

489 U.S. at 312-13 (emphasis supplied).

The new rule limitation applies to capital cases. Penry v. Lynaugh, 492 U.S. 302 (1989). Butler v. McKellar, 494

U.S. 407 (1990), provides insight into those situations where, even if a court's decision does not "break new ground" or "impose a new obligation," it might still run afoul of Teague. That a court may say that its decision is merely an extension of the reasoning of previous cases, is not conclusive for purposes of deciding whether the current decision is a new rule under Teague. 110 S. Ct. at 1217. A prime example is Butler, a capital case. Butler sought the benefit of Arizona v. Roberson, 486 U.S. 675 (1988), decided after his conviction became final. He contended that Roberson was not a new rule, but merely an application of Edwards v. Arizona, 451 U.S. 477 (1981), to a slightly different set of facts. Rejecting that, this Court said:

> But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision,

> is not conclusive for purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In Roberson, for instance, the Court found Edwards controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. 486 U.S., at 679, n. 3, 108 S.Ct., at 2097, n. 3. That the outcome in Roberson was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson. We hold, therefore, that Roberson announced a "new rule."

494 U.S. at 415 (emphasis supplied). Finding that a violation of the additional restrictions of Roberson was more likely to increase, rather than diminish, the accuracy of a conviction, this Court refused to apply it to Butler. Id. at 416.

Robyn Parks maintained that an instruction telling the jurors to avoid the influence of sympathy violated the Eighth Amendment and was not a new rule, just an extension of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Reviewing the criteria set forth in Teague and Butler, this Court disagreed. The Court emphasized that the question whether the defendant sought a new rule must be considered "by reference to the underlying purposes of the habeas writ." Saffle v. Parks, 494 U.S. 484 (1990). Foremost among those purposes was assuring that the state courts had conducted the proceedings in accordance with the Constitution as interpreted at the time of the proceedings. 494 U.S. at 488. Even if this Court agreed that Lockett and Eddings governed the analysis of Parks' claim, "it does not follow that they compel the rule that Parks seeks."

Id. at 491. The Court concluded that neither Lockett, Eddings, nor Penry compelled the new rule Parks sought and, because he satisfied neither of the two exceptions of Teague, the Court would not apply a new rule to his case. Id. at 494-95.

In another death penalty case, Sawyer v. Smith, 494 U.S. ___, 110 S. Ct. 2822 (1990), this Court rejected Sawyer's contention that he was entitled to have Caldwell v. Mississippi, 472 U.S. 320 (1985), apply to his case. Sawyer's conviction became final before this Court decided Caldwell v. Mississippi. The Court agreed that Caldwell announced a new rule, but refused to apply it to Sawyer because it did not come within Teague's exception "for watershed rules fundamental to the integrity of the criminal proceeding." 110 S. Ct. at 2824-25. Again the Court stressed that the purpose of federal habeas is not to

provide a mechanism for the continual re-examination of final judgments, but to ensure that those convictions comported with federal law in existence at the time. Id. at 2827.

Teague and its progeny make it clear that the Ninth Circuit has created and applied new rules within the meaning of Teague and in neither instance does the new rule fall within the exceptions in Teague.

B.

Alabama v. Smith.

About 5 months after the Ninth Circuit denied Petitioners' first Motion for Reconsideration on February 1, 1989, this Court decided Alabama v. Smith, 490 U.S. 794 (1989). Smith pled guilty to certain crimes; on appeal, he succeeded in having his plea set aside as involuntary. Upon remand, the prosecutor proceeded to trial on the original charges. Smith was convicted and received an appreciably

longer sentence than he did under the plea agreement. On appeal, Smith claimed judicial vindictiveness because he received a longer sentence after trial than he had under the plea agreement. A majority of the Alabama Supreme Court agreed. But this Court, recognizing the evolution of case law involving guilty pleas, refused to apply a presumption of vindictiveness to the harsher sentence. In so doing, the Court overruled Simpson v. Rice, 395 U.S. 711 (1969), the companion case to North Carolina v. Pearce, 395 U.S. 711 (1969):

> With respect, it does not appear that the Court gave any consideration to a possible distinction between the Pearce case, in which differing sentences were imposed after two trials, and the Rice case, in which the first sentence was entered on a guilty plea.
>
> The failure in Simpson v. Rice to note the distinction just described stems in part from that case having been decided before some important developments in the constitutional law of guilty pleas. A guilty plea may justify leniency, Brady v. United States, supra; a prosecutor may offer a

"recommendation of a lenient sentence or a reduction of charges" as part of the plea bargaining process, Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978) and we have upheld the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial, Id.; we have recognized that the same mutual interests that support the practice of plea bargaining to avoid trial may also be pursued directly by providing for a more lenient sentence if the defendant pleads guilty. Corbitt v. New Jersey, 439 U.S. 212, 221-223, 99 S.Ct. 492, 498-499, 58 L.Ed.2d 466 (1978).

Part of the reason for now reaching a conclusion different from that reached in Simpson v. Rice, therefore, is the later development of this constitutional law relating to guilty pleas. Part is the Court's failure in Simpson to note the greater amount of sentencing information that a trial generally affords as compared to a guilty plea. Believing as we do that there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea, we

> overrule Simpson v. Rice, supra, to that extent.

Alabama v. Smith, 490 U.S. at 802-03 (emphasis supplied). Petitioners will now discuss the applicability of Teague and Smith to the issues of prosecutorial vindictiveness and judicial arbitrariness.

C.

Prosecutorial Vindictiveness.

A majority of the Ninth Circuit held that a presumption of vindictiveness was warranted because the State sought the death penalty for the same conduct to which it earlier permitted Adamson to enter a plea to second-degree murder, and because the State refiled the original charge after Adamson breached the plea agreement and invoked the Fifth Amendment at a bond reduction hearing prior to the anticipated retrial. Adamson v. Ricketts, 865 F.2d 1011, 1018-19 (9th Cir. 1988) (en banc). In its latest opinion of January 30, 1992, the Ninth

Circuit refused to apply Teague v. Lane and said that Alabama v. Smith made no difference because it dealt with judicial vindictiveness, not arbitrariness, and did not involve the death penalty. (Appendix A at 27-28, 30-31.)

Under Teague, a court announces a new rule when it breaks new ground, imposes a new obligation on the State, or when it reaches a result not dictated by precedent existing at the time of the defendant's conviction. The Ninth Circuit's 1988 majority opinion cites no case from this Court case dictating a presumption of vindictiveness under the circumstances of this case. That reasonable minds could differ about whether such a presumption was warranted is evidenced by the four dissenters in the 1988 opinion and the three-judge panel that dismissed this contention originally in Adamson v. Ricketts, 758 F.2d 441, 449 (9th Cir. 1985). Thus, an

equal number of judges of the Ninth Circuit have found no valid constitutional basis for indulging in that presumption. It is therefore impossible to say that existing precedent from this Court dictated the result reached by the majority. A decision that is susceptible to debate among reasonable minds is a strong indication that a court is announcing a new constitutional rule. Butler v. McKellar, 494 U.S. at 415.

None of the cases cited by the Ninth Circuit dealt with a breached plea agreement in which the defendant agreed that the original charge would be automatically reinstated if he breached. A defendant who rejects a plea offer, or fails to accept it before it lapses, has no valid constitutional claim, after trial, that the State vindictively sought the death penalty because he insisted upon a trial. Hayes v. Lockhart, 852 F.2d 339, 344 (8th Cir. 1988) (no penalty

for going to trial even though the prosecutor twice before trial offered life without parole); Bundy v. Dugger, 850 F.2d 1402, 1423 (11th Cir. 1988) (death penalty not improperly imposed because the state, prior to trial, offered a life sentence); Thompson v. Lynaugh, 821 F.2d 1054, 1064-65 (5th Cir. 1987) (state's offer of life before trial, rejected by the defendant, did not prevent imposition of the death penalty after trial).

This Court has said that, in a pretrial setting, the prosecution may threaten or file increased charges to induce a plea agreement. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) If this is the law, how can a defendant who nullifies the agreement by breaching it -- and this Court has already found that Adamson did breach the agreement, Ricketts v. Adamson, 483 U.S. 1 (1987) -- claim the prosecution must rebut a presumption of

vindictiveness before proceeding on the original charge? If, as this Court said, it was of "no moment" that Adamson offered to testify after he was declared in breach, it cannot be vindictive to do precisely as he agreed the State could do -- prosecute him on the original charge. 483 U.S. at 12.

The Ninth Circuit's holding about prosecutorial vindictiveness runs afoul of Teague -- and that is why the Ninth Circuit refused to consider Teague. No rational reading of this Court's cases, or those from other circuits, dictated the conclusion that the breaching party, Adamson, should be allowed to avoid the enforcement provisions to which he agreed by creating a presumption of vindictiveness to prevent the State from pursuing the original charge. Such a rule has nothing to do with the accuracy of the conviction, nor does it implicate

a watershed rule fundamental to the integrity of the criminal process.

Similarly, the holding on vindictiveness fails to recognize that once the defendant has nullified the plea agreement by his actions, the previous reasons that may have justified leniency no longer exist. Alabama v. Smith. If this Court would not entertain a presumption of vindictiveness in Smith, where the defendant at least pursued the legal route of appeal to set aside his plea agreement, it is inconceivable that the Ninth Circuit correctly applied the law by indulging a presumption of vindictiveness where John Harvey Adamson breached the agreement and automatically returned the parties to the status quo prior to the plea agreement.

Teague and Smith make it clear that the Ninth Circuit was "demonstrably wrong," but only this Court can correct that error.

D.

Arbitrary and Capricious Sentencing.

The Ninth Circuit rejected the claim that the trial court vindictively sentenced Adamson to death after his conviction for first-degree murder, but agreed that the trial court arbitrarily sentenced him to death. That court gave two reasons: (1) the trial judge had learned nothing new about the case from the time he sentenced Adamson under the plea agreement; (2) the trial judge earlier found that the stipulated term of years under the agreement was an appropriate penalty. That, too, violated Teague v. Lane because it was not dictated by any case cited by the majority.

The cases from this Court that have examined sentencing procedures in death cases have never held that sentencing a defendant to death was arbitrary or capricious simply because earlier he had

received a different sentence in a plea agreement involving a lesser charge. This Court's concern has been that the sentencer's discretion be guided by criteria that argue for and against the death penalty, and that a defendant not be restricted in the presentation of mitigation. Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153, 189, 195 (1976); Proffitt v. Florida, 428 U.S. 242, 251-53 (1976). If the sentencing process contains sufficient safeguards to ensure that death has not been capriciously imposed, the Constitution requires nothing more. This Court has held that Arizona's sentencing statute is constitutional. Walton v. Arizona.

Every plea agreement by definition is a compromise -- that is the inducement to the defendant, who would prefer not to risk trial on the more serious charge. Sentencing concessions are at the heart

of a plea bargain. Mabry v. Johnson, 467 U.S. 504, 508 (1984). In Alabama v. Smith, this Court recognized that a trial judge is operating in one context when he accepts a guilty plea and another when he sentences after presiding over a full trial on the merits:

> In the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Supra, at 2203. See United States v. Grayson, 438 U.S. 41, 53, 98 S.Ct. 2610, 2617, 57 L.Ed.2d 582 (1978) (sentencing authority's perception of the truthfulness of a defendant testifying on his own behalf may be considered in sentencing). Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present. See Brady v. United States, supra, 397 U.S. at 752, 90 S.Ct., at 1471. Here, too, although the same Judge who sentenced following the guilty plea also imposes sentence following trial, in conducting the trial the court is not simply "do[ing] over what it thought it had already done correctly." Colten, supra, 407 U.S., at 117, 92 S.Ct., at 1960. Each of these

> factors distinguishes the present case, and others like it, from cases like Pearce. There, the sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness.

490 U.S. at 801-02.

The Ninth Circuit has created a new rule by holding that, once a trial court sentences a defendant to a lesser charge, that court has made an irrevocable moral assessment that the defendant's conduct does not merit, and cannot justify, a greater sentence than the sentence in the plea agreement. So, under the Ninth Circuit's rationale, any trial judge who accepts a plea agreement to a lesser charge may never impose a greater sentence upon the defendant regardless of the nullification of the plea agreement (by the defendant), a trial on the merits, conviction for a greater offense,

aggravation proved by the State, and lack of substantial mitigation from the defendant.

Even without Teague v. Lane and Alabama v. Smith, the Ninth Circuit's reasoning makes no sense. Under the original plea agreement, Adamson pled to second-degree murder and a stipulated term of years for his sentence. The trial court had no legal reason to consider aggravation or mitigation because those come into play in Arizona only when one has been convicted of first-degree murder. A.R.S. §§ 13-703(A) and (E). Once Adamson breached the agreement and was convicted of first-degree murder, however, the trial judge had to consider the sentence in a totally different context of aggravating and mitigating circumstances. A.R.S. § 13-703(E). As this Court noted in Alabama v. Smith, the trial court was not simply "doing over" what it thought it had done correctly

before. The trial court was sentencing in a totally different context after 12 jurors had convicted Adamson of a greater offense, first-degree murder. The State proved two aggravating circumstances and Adamson could not produce substantial mitigation.

Even before Teague and Smith, five judges of the limited en banc panel of 11 judges found the majority's reasoning on this issue unpersuasive. Adamson v. Ricketts, 865 F.2d 1011, 1045, 1048-53 (9th Cir. 1988) (en banc). After Teague and Smith, the majority's conclusion cannot be justified. But the majority ignored Teague and "distinguished" Smith by saying that it was not a death penalty case. The trial judge did not act arbitrarily or capriciously by imposing the death penalty, for a greater offense, pursuant to a statute this Court has upheld.

CONCLUSION

By refusing to stay the mandate to permit the full court to consider the effect of Teague v. Lane and Alabama v. Smith upon the only two issues left for granting relief, and by totally ignoring Teague, the Ninth Circuit has demonstrated more sensitivity to an award of attorney's fees than it has to controlling precedent from this Court that would change the result if applied. The Ninth Circuit abused its discretion by refusing to stay the mandate and apply the proper law as announced by this Court. Such behavior is in disregard of this Court's authority as the supreme tribunal of this land and of the Ninth Circuit's position as an inferior court under the Constitution. The Ninth Circuit has treated Petitioners unfairly. Petitioners respectfully urge the Court to grant certiorari, to apply

Teague and Smith, and to affirm the district court's denial of relief.

DATED this 29th day of April, 1992.

Respectfully submitted,

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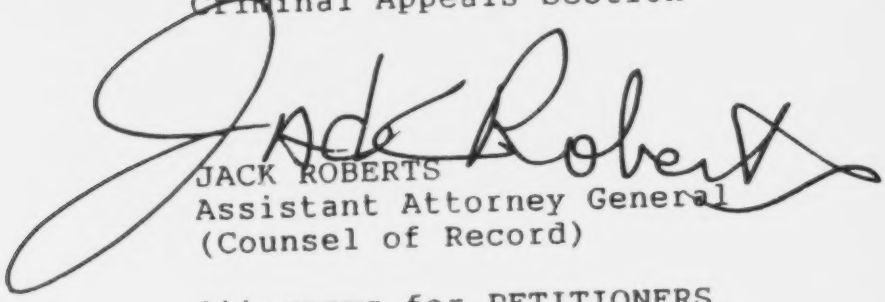

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APPENDICES

APPENDIX A

[Filed January 30, 1992]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 84-2069
v.	)	
	)	D.C. No.
SAMUEL A. LEWIS,*	)	CV-83-2323-PHX
Director, Arizona	)	
Department of	)	OPINION
Corrections, et al.,	)	
	)	
Respondents-Appellees.	)	

Appeal from the United States
District Court for the
District of Arizona
C.A. Muecke, District Judge, Presiding

Argued and Submitted
November 13, 1990-
San Francisco, California

Filed January 30, 1992

Before: Hug, Schroeder, Pregerson, Alarcon, Ferguson, D.W. Nelson, Boochever, Norris, Beezer, Brunetti, and Thompson, Circuit Judges.

Opinion by Judge Hug; Dissent by Judge Brunetti, with whom Judges Alarcon and Beezer join dissenting.

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*Samuel A. Lewis is substituted for his predecessor, James G. Ricketts, as Director of Arizona Department of Corrections. Fed. R. App. P. 43(c)(1).

SUMMARY

Courts and Procedure/Appeals

Ordering that its previous mandate declaring appellant's sentence of death under Arizona law unconstitutional shall issue immediately, the en banc court of appeals held that, although the Supreme Court decisions in Walton and Lewis upheld the constitutionality of the Arizona death penalty statute, the Ninth Circuit's previous en banc's mandate should not be stayed after the Supreme Court denied certiorari in this case because application of the subsequent Supreme Court authority did not require a change in the result of the court's previous en banc decision.

Appellant John Harvey Adamson was convicted in Arizona state court of first degree murder and sentenced to death. Two Ninth Circuit three-judge panels

affirmed the district court's denial of Adamson's two previous petitions for habeas relief. Subsequently, an en banc panel reversed the three-judge panel on double jeopardy grounds, and was in turn reversed by the Supreme Court. On remand, ruling on issues that it had expressly declined to address in its prior opinion, the en banc panel found Adamson's death sentence to be unconstitutional and remanded to the district court. A state petition to the Supreme Court for certiorari was denied. However, one day before ruling on that petition, the Supreme Court decided Walton and Lewis, upholding the constitutionality of the Arizona death penalty statute against challenges similar to those relied upon in the court's en banc decision. The state contended that even though the Supreme Court denied certiorari and did not

vacate this case, the en banc panel should withhold its previous mandate and reconsider the case in light of the subsequent Supreme court decisions. A subsequent issue arose when the State and Adamson entered into a Stipulation and Cooperation Agreement that could result in reinstating the original 1977 plea agreement. The state contended that the case was moot and therefore the appeal should be dismissed and the judgment vacated.

[1] This case was not moot at this time. The death sentence had not been vacated. It could be vacated only if the conditions of the Stipulation and Cooperation Agreement are fulfilled. THus, a death sentence held to have been unconstitutionally imposed will be carried out. [2] Also, until the limited en banc court rules on the issue of whether to stay the issuance of the

mandate, a petition for rehearing before the full court is premature. [3] Thus, the essential question presented to the en banc panel for consideration was whether it should retain jurisdiction to reconsider its prior en banc decisions in light of the Supreme Court cases decided, after the Supreme Court denied certiorari but before the mandate has issued from the Ninth Circuit. [4] The court held, however, that the application of the subsequent Supreme Court authority did not require a change in the result of its en banc decision. Although the Supreme Court's decisions overruled in some respects the court's en banc rulings on the issues regarding the overall constitutionality of Arizona's death sentence statute, there were two bases for the court's decision that were not affected: State judicial arbitrariness in violation of the eighth and fourteenth

amendments, and prosecutorial vindictiveness. [5] Thus, the stay of the mandate in this case for reconsideration by the limited en banc court was not justified because the subsequent Supreme Court authority did not dictate a change in result. The judgment would remain the same. However, Supreme Court authority on the Arizona statutory issues, to the extent it was inconsistent with the Ninth Circuit holdings, governed future cases.

Judge Brunetti, joined by Judges Alarcon and Beezer dissented, stating that there were exceptional circumstances in this case justifying the recalling of the court's previous en banc mandate to allow the full court to review the en banc panel's approach to this issue.

COUNSEL

Timothy J. Foley, San Francisco, California, and Timothy K. Ford,

MacDonald Hoague & Bayless, Seattle, Washington, for the petitioner-appellant.

Jack Roberts, Assistant Attorney General, Phoenix, Arizona, for the respondents-appellees.

OPINION

HUG, Circuit Judge:

This death penalty case involves the fifth time this court has considered a challenge by John Harvey Adamson to the State of Arizona's efforts to sentence him to death, and the third time this court has sat en banc to review Adamson's sentence. A thorough history of the background of this case is set forth in our prior en banc decision. Adamson v. Ricketts, 865 F.2d 1011, 1013-16 (9th Cir. 1988), cert. denied sub nom., Lewis v. Adamson, 110 S. Ct. 3287 (1990).

In our en banc decision, we held the sentence of death to be unconstitutional on six grounds. The State petitioned for certiorari to the United States Supreme Court. One day before ruling on that petition, the Supreme Court filed the decisions in Walton v. Arizona, 110 S.Ct. 3047 (1990), and Lewis v. Jeffers, 110 S.Ct. 3092 (1990), which upheld the constitutionality of the Arizona death penalty statute against two challenges similar to those relied upon in our en banc decision. The following day, the State's petition for certiorari in this case was denied.

Prior to issuance of the mandate by our Clerk's office, the State filed a motion with our court to stay the issuance of the mandate and a motion for a rehearing and a rehearing en banc before the full court. The ground for the motions is that the cases of Walton, Lewis, and a

third prior case, Alabama v. Smith, 490 U.S. 794 (1989), undermined the authority of our decision in this case. The State contended that even though the Supreme Court denied certiorari and did not vacate this case, we should withhold the mandate and reconsider the case in light of these subsequent Supreme Court decisions.

A subsequent issue arose when the State and Adamson entered into a Stipulation and Cooperation Agreement that could result in reinstating the original 1977 plea agreement. The State contends that the case is moot and therefore the appeal should be dismissed and the judgment vacated. We hold that the case is not moot and that the mandate should not be withheld, but should be issued forthwith.

I.

Background

Adamson first appealed to this court in 1980 after the district court rejected

Adamson's petition for habeas corpus review of the state court's order vacating his sentence of imprisonment, his judgment of conviction, and his guilty plea to second degree murder, and after the State had proceeded to prosecute Adamson for first degree murder. In an unpublished disposition, a three-judge panel of this court affirmed the district court's denial of Adamson's petition. Adamson v. Hill, No. 80-5941 (9th Cir. Nov. 30, 1981) (unpublished disposition).

Following Adamson's conviction and death sentence, and after Adamson had exhausted all of his state remedies, a three-judge panel of this court then affirmed the district court's denial of Adamson's second petition for habeas corpus review. Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985) (Adamson I). This en banc panel then reversed the

three-judge panel on double jeopardy grounds, Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986) (en banc) (Adamson II), and was in turn reversed by the Supreme Court. Ricketts v. Adamson, 483 U.S. 1 (1987). On remand, in ruling on issues that we had expressly declined to address in our prior opinion, we found Adamson's death sentence to be unconstitutional on various constitutional grounds and remanded the case to the district court with instructions to grant the writ unless the State, within a reasonable time, resentenced Adamson to a sentence other than death. Adamson v. Ricketts, 865 F.2d 1011, 1044 (9th Cir. 1988) (en banc) (Adamson III). The State petitioned the Supreme Court for certiorari and we entered a stay of the issuance of the mandate pending the Supreme Court's action on the petition.

The issues before us now arise from actions taken by the State following the Supreme Court's denial of the petition for certiorari. The relevant facts and prior proceedings surrounding the present case are set forth below.

II.

The 1988 En Banc Decision

In the opinion filed December 22, 1988, this en banc court addressed the following claims of constitutional violations: (1) seeking and imposing the death penalty after Adamson asserted his Fifth Amendment right against self-incrimination constituted prosecutorial and judicial vindictiveness; (2) the judge's imposition of the death penalty, when he had originally determined that a sentence of 48-49 years was the appropriate penalty for Adamson, was judicial arbitrariness that violated the Eighth

Amendment; (3) the Arizona death penalty statute violated Adamson's Sixth Amendment rights to a jury determination of the existence of aggravating circumstances; (4) the statute utilized an aggravating factor that was unconstitutionally vague; (5) the statute violated the Eighth Amendment by precluding meaningful consideration of all mitigating circumstances and by creating a presumption of imposition of a death sentence; and (6) the State trial court erroneously admitted evidence in violation of the Confrontation Clause. Adamson III, 865 F.2d at 1016-17. In reversing the district court by upholding five of Adamson's asserted claims, we held that the State's decision to seek the death penalty after previously agreeing to a term of imprisonment raised a presumption of prosecutorial vindictiveness sufficient to warrant a

remand to the district court for an evidentiary hearing, but found insufficient evidence of judicial vindictiveness. Id. at 1017. However, we held that the state trial judge's imposition of the death penalty was arbitrary in violation of the Eighth and Fourteenth Amendments. Id. at 1020. We also held that the Arizona death penalty statute was unconstitutional on all three of the grounds asserted by Adamson. Id. at 1029, 1038, 1039. We affirmed the district court's rejection of Adamson's claim that the admission of certain hearsay statements at trial violated the Confrontation Clause. Id. at 1044.

The State timely petitioned for rehearing on January 9, 1989. The petition was not accompanied by a suggestion for rehearing by the full en banc court. On February 1, 1989, a majority of this panel denied the State's

petition for rehearing. We granted the State's motion to stay issuance of the mandate pending the Supreme Court's final disposition of the State's petition for certiorari review. On March 20, 1989, the State filed its petition for certiorari to the Supreme Court. The Supreme Court denied the State's petition on June 28, 1990, and the denial was filed with this court on July 2, 1990.[1]

After the Supreme Court's denial of certiorari, but prior to issuance of this court's mandate, the State filed a motion to stay issuance of the mandate on July 10, 1990. Also on July 10, 1990, the State submitted a "Motion For

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[1]In denying the State's petition, four justices voted to deny certiorari, three justices voted to grant certiorari, and the remaining two justices took no part in deciding whether to grant review.

Rehearing and Suggestion for Rehearing Before Full En Banc Court," which was followed by a "Motion to Circulate Petition For Rehearing Before the Full Court" submitted on July 16, 1990. This was the State's first request for rehearing before the full en banc court.

III.

Mootness Contention

While these issues were pending, the State and Adamson entered into a "Stipulation and Cooperation Agreement," which essentially reinstated the January 15, 1977 plea agreement. The Stipulation and Cooperation Agreement was approved by the Superior Court of Arizona, Maricopa County, on February 1, 1991. Under the terms of that agreement, "Adamson agrees to cooperate fully with the State in the investigation and prosecution of the June 1976 murder of Donald Bolles, and in the investigation

and prosecution of any crimes or cases arising out of or connected with the murder." This principally involves the murder trials of Robinson and Dunlap, who allegedly hired Adamson to commit the murder of Bolles, for which Adamson was convicted and sentenced to death in 1980. After completion of the murder trials of Robinson and Dunlap, Adamson will tender to the State trial court a guilty plea to second degree murder and will request "that the court reactivate the January 15, 1977 plea agreement." The State agrees that "the State will, if Adamson has at all times provided complete and truthful testimony and otherwise complied with the terms of this agreement, join in that request and in Adamson's motion." The agreement further provides that if Adamson violates the terms of the agreement, the first degree

murder conviction and death sentence will be automatically reinstated.

On the basis of this Stipulation and Cooperation Agreement, the State has filed a motion to vacate the judgment of our court and to dismiss the appeal as moot. We conclude, however, that the case is not moot because all of the conditions precedent to the vacation of Adamson's death sentence have not been fulfilled.

A habeas corpus petition is not moot "until it can be said with certainty" that the state court judgment in question will not affect the petitioner's liberty. Mancusi v. Stubbs, 408 U.S. 204, 206 (1972). So long as a habeas petitioner remains confined under a sentence from which he has not been unconditionally released, he can validly contest it in federal court. Maglena v. Cook, 490 U.S. 488, 491-92 (1989).

[1] In the situation before us, the death sentence has not been vacated. It may be vacated only if the conditions of the Stipulation and Cooperation Agreement are fulfilled. Otherwise, a death sentence that we have held to have been unconstitutionally imposed will be carried out. The case, therefore, is not moot at this time. The case would become moot only if Adamson fulfills the terms of the Stipulation and Cooperation Agreement, approved February 1, 1991, to the satisfaction of the State, and the Superior Court enters an order, on the joint application of the parties, setting aside the death sentence and reinstating the January 15, 1977 plea agreement.

IV.

Procedural Posture

The procedural posture of this matter deserves clarification. The State submitted for filing a Motion for

Rehearing and Suggestion for Rehearing Before the Full En Banc Court and also submitted a motion to circulate that petition to the full court. The rules of appellate procedure also require that a petition for rehearing "be filed within 14 days after entry of judgment," and that a suggestion for a rehearing en banc be made on the same day. Fed. R. App. P. 40(a); 35(c). A party's suggestion for a rehearing before the full court must also be filed within 14 days of the filing of an en banc opinion. 9th Cir. Gen'l Order 5.8(a). Thus, considered as a petition for rehearing, the petition is untimely.

[2] The limited en banc court determined to treat the motion as a motion to stay the issuance of the mandate and called for additional briefing and oral argument on that question. Until the limited en banc

court rules on the issue of whether to stay the issuance of the mandate, a petition for rehearing before the full court is premature.

V.

Stay of Mandate

Fed. R. App. P. 41(b) permits a stay of the issuance of a mandate granted to a party who has filed a petition for writ of certiorari in the Supreme Court to "continue until final disposition by the Supreme Court." Rule 41(b) also requires that, "[u]pon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately." (Emphasis added).

[3] In this case, due to a clerical error, the mandate was not issued on July 2, 1990, the day the Supreme Court's denial of the State's petition for certiorari was filed in this court, and the mandate had not yet issued on

July 10, 1990, when the State submitted its petition for rehearing and suggestion for rehearing before the full en banc court. As a result, the State urged us to stay issuance of the mandate and retain jurisdiction to reconsider our prior decision in light of the Supreme Court's recent decisions in Walton v. Arizona, 110 S.Ct. 3047 (1990), Lewis v. Jeffers, 110 S.Ct. 3092 (1990), and Alabama v. Smith, 490 U.S. 794 (1989). The essential question presented for our consideration is whether we should retain jurisdiction to reconsider our prior en banc decisions in light of those cases, after the Supreme Court has denied certiorari, but before the mandate has issued from our court.

The State relies on the three-judge panel decision in Bryant v. Ford, 886 F.2d 1526 (9th Cir. 1989), cert. denied, 493 U.S. 1076 (1990), in which we did stay the mandate following the Supreme

Court's denial of certiorari. We held that because of Fed. R. App. P. 41(b)'s express direction that the mandate "shall issue immediately upon the denial of certiorari," the mandate could only be stayed upon the same exceptional circumstances justifying a recall of the mandate. We noted our three-judge panel decision in Zipfel v. Halliburton Co., 861 F.2d 565 (9th Cir.), cert. denied, 486 U.S. 1054 (1988), in which we upheld the power to recall the mandate, but only in exceptional circumstances. We there held that the recall was justified because of "an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice." Id. at 567-68. In Zipfel, we initially reversed a district court injunction that would have governed the course of future litigation by foreign seamen in Texas state courts. Four

months later, the Supreme Court, in a very similar case involving future litigation in Texas courts, Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988), held that the entry of a limited injunction was proper. The application of Chick Kam Choo would require a contrary result from that of our initial decision in Zipfel. Thus, by compulsion of the federal courts, the Texas state courts would be required to apply different rules in essentially identical cases.

In Bryant, the exceptional circumstance held to warrant a stay of the mandate was Congress's enactment of an amendment to the removal jurisdiction statute, while the case was pending on certiorari, providing that the inclusion of "doe defendants" in a civil complaint did not defeat diversity jurisdiction. See Bryant, 886 F.2d at 1527, 1529-30. Congress's action was in direct conflict

with our prior en banc decision in Bryant, which had held that the inclusion of "doe defendants" defeated diversity jurisdiction. Bryant v. Ford Motor Co., 844 F.2d 602 (9th Cir. 1987) (en banc). The en banc court then remanded the case to the three-judge panel which held that "Congress's action while this case was pending on certiorari justifies a stay of the mandate, and we choose to exercise our discretion to do just that .... " Bryant, 886 F.2d at 1530. The result of the previous en banc decision in Bryant was to deny subject matter jurisdiction over a case that Congress had specifically declared should come within federal court jurisdiction, thus denying the removing party its day in federal court.

[4] In Bryant, as in Zipfel, the application of the change in law required a significant change in the result for the parties. In the Adamson case before

us, the application of the subsequent Supreme Court authority does not require a change in the result of our en banc decision. The Supreme Court's decisions in Walton and Jeffers overrule in some respects our en banc rulings in Adamson on the issues regarding the overall constitutionality of Arizona's statute for sentencing in capital cases. However, there are two bases for our decision that were not affected by Walton and Jeffers, those being (1) judicial arbitrariness in violation of the Eighth and Fourteenth Amendments, and (2) prosecutorial vindictiveness. The judicial arbitrariness determination overrides the determination of prosecutorial vindictiveness because the former triggers complete relief, whereas the latter only requires a remand for an evidentiary hearing. Adamson, 865 F.2d at 1044. We stated,

> In Part II, we affirm the district court on the issue of judicial vindictiveness. We reverse the district court with regard to the issue of prosecutorial vindictiveness and remand with instuctions to conduct an evidentiary hearing on that issue.
>
> In Part III, we reverse the district court and hold that the death penalty was imposed arbitrarily, in violation of the Eighth and Fourteenth Amendments. We remand to the district court with instructions to grant the writ of habeas corpus unless the State, within a reasonable time, resentences Adamson to a sentence other than death.

Id.

The State contends that the Supreme Court's decision in Alabama v. Smith, 490 U.S. 794 (1989), undermines the judicial arbitrariness ground. In that non-capital case the Supreme Court held that the fact that a sentencing judge increased the sentence after a guilty plea was set aside did not raise a presumption of judicial vindictiveness. This comports with our determination in this case that there was insufficient

evidence of judicial vindictness. However, it does not affect the judicial arbitrariness ground. The Smith case involved no issue of judicial arbitrariness under the Eighth and Fourteenth Amendments, which was raised in this case because of the fact that the death penalty was involved. Because no Supreme Court case issued since our opinion in Adamson III leads us to modify our holding regarding "judicial arbitrariness," we need not decide whether Smith or any other recent case undermines our conclusion regarding "prosecutorial vindictiveness."

[5] In this en banc decision, we need not determine whether the standard used in Zipfel and Bryant to recall or stay the mandate is sufficiently stringent to determine its applicability to criminal cases. Even under the threshold specified in those cases, the stay of the mandate for reconsideration by the

limited en banc court is not justified. The subsequent Supreme Court authority does not dictate a change in result. The judgment would remain the same. It is apparent that the Supreme Court authority on the Arizona statutory issues, to the extent it is inconsistent with our holdings, must govern future cases. Panels of this court are not bound by decisions of prior panels or en banc decisions that are clearly inconsistent with the subsequent Supreme Court decisions. See Sheehan v. United States, 896 F.2d 1168, 1172 n.7 (9th Cir.) (collecting cases), amended by 917 F.2d 424 (9th Cir. 1990).

District courts and appellate panels are fully capable of applying the Supreme Court precedent and distinguishing it from circuit court precedent that is inconsistent. This is a common occurrence in the federal judicial system when the Supreme Court overrules circuit

court precedent. Several panels of our court have already done so in applying our en banc decision in this case. See, e.g., Nichols v. McCormick, 929 F.2d 507 (9th Cir. 1991); Richmond v. Lewis, No. 86-2382, slip op. (9th Cir. Jan. 14, 1992); Taylor v. Kincheloe, 920 F.2d 599 (9th Cir. 1990); Smith v. McCormick, 914 F.2d 1153, 1169-70 (9th Cir. 1990).

VI.

Teague Contention

The State urges us for the first time in its brief on this motion that exceptional circumstances exist to allow staying the mandate and reconsideration of our en banc decision because of the nonretroactivity principles announced in Teague v. Lane, 489 U.S. 288, 295-96 (1989), and first applied to death penalty cases in Penry v. Lynaugh, 492 U.S. 302, 314-15 (1989). The State maintains that the en banc rulings on prosecutorial vindictiveness and judicial

arbitrariness are "new rules" within the ambit of Teague and Penry. The Teague issue, decided shortly after our denial of the State's first petition for rehearing, was not even raised by the State in its petition for certiorari before the Supreme Court. This contention is not appropriate to be raised at this late stage as an exceptional circumstance to justify a stay of the mandate to consider that issue.

VII.

Conclusion

We conclude that, because of the requirements of Fed. R. App. P. 41(b), the mandate should issue immediately. Any stay of mandate would have to be justified upon the same grounds as would justify a recall of mandate. In this case, the result of the application of subsequent Supreme Court authority would not change the result of our en banc

opinion. Any reconsideration, based upon that subsequent Supreme Court authority, would amount to no more than an advisory opinion. The application of the subsequent Supreme Court authority is best made by the district courts and future appellate panels on a case-by-case basis.

THE MANDATE SHALL ISSUE IMMEDIATELY

BRUNETTI, Circuit Judge, with whom Judges Alarcon and Beezer join, Dissenting:

The unique procedural history of this case deprived the state from fully challenging the correctness of our prior en banc decision. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). I continue to believe that that decision is incorrect and clearly inconsistent with the Supreme Court's direction. Therefore, I believe there are exceptional circumstances in this case to

justify recalling our mandate to allow the full court to review our approach to this case. Thus, I respectfully dissent.

I.

Case History

I agree with the majority that an understanding of the procedural posture of this matter is necessary to consider the question before us. This is the third time our en banc court has heard an issue stemming from John Adamson's conviction for the 1976 murder of Donald Bolles, an investigative reporter. The first en banc decision reversed a three-judge panel and would have vacated Adamson's murder conviction on double jeopardy grounds. Adamson v. Ricketts, 789 F.2d 722, 730 (9th Cir. 1986) (en banc). I dissented because of my belief that the en banc court misapplied constitutional law and Supreme Court precedent. See id. 735-47 (Brunetti, J., dissenting). The Supreme

Court squarely reversed the Ninth Circuit and reinstated Adamson's sentence. Rickets v. Adamson, 483 U.S. 1 (1987).

When the en banc court resumed control of the case on remand it again reversed Adamson's death sentence and remanded for resentencing. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). Once again I dissented from the opinion because of difficulties with the majority's legal analysis. 865 F.2d at 1045-69 (Brunetti, J., dissenting). Undeterred by clear Supreme Court precedent, the majority relied on four theories to vacate Adamson's death sentence and on one theory remanded to the district court for an evidentiary hearing. 865 F.2d at 1045. Three of the majority's reasons for vacating the death sentence involved the alleged unconstitutionality of Arizona's death sentence statutes. The majority's reasoning on these three issues was

firmly rejected by the Supreme Court in Lewis v. Jeffers, 110 S. Ct. 3092 (1990), and Walton v. Arizona, 110 S. Ct. 3047 (1990). The other two underpinnings of the en banc panel's decision, judicial arbitrariness and prosecutorial vindictiveness, were undercut by a third Supreme Court case, Alabama v. Smith, 109 S. Ct. 2201 (1989).

After our en banc decision, Arizona was faced with a choice: challenge our decision (in particular, our ruling on the constitutionality of the Arizona statutory scheme) through a request for a rehearing before the full court of the Ninth Circuit or petition the Supreme Court for a writ of certiorari. Arizona made the reasonable determination that our cases might be contrary to Supreme Court precedent and that the Court would grant certiorari to consider these important issues. This is exactly what happened in Lewis and Walton.

But something unexpected happened in Adamson. Two Justices, O'Connor and Kennedy, did not take part in the consideration of the petition for writ of certiorari. Ricketts v. Adamson, 110 S. Ct. 3287 (1990). Although three of the Justices considering the petition specifically stated that they "would grant the petition for a writ of certiorari, vacate the judgment and remand[] the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of" Lewis, Walton, and Smith. Arizona failed to garner the four votes necessary for the petition to be granted. Id. Considering the Court's posture in Lewis, Walton, and Smith, the failure to grant the petition appears to have resulted solely from the absence of the participation of Justices O'Connor and Kennedy in the process. Consequently, there is an unfortunate and

irreconcilable conflict between Adamson and Lewis, Walton, and Smith, which would not exist if the analysis in my dissent prevailed.

II.

Exceptional Circumstances

This unusual circumstance justifies recalling our mandate and reconsidering our decision. The judicial power is vested in the Supreme Court first and we are an inferior court bound to follow its dictates. U.S. Const. art. III, § 1. The actions of the Court following our Adamson en banc decisions should cause us to question whether we correctly applied the law. We have an opportunity to do so, and at least three of the Justices believe it is necessary. The rare posture of this case is exceptional enough for us to take the severe step of recalling our mandate.

In conclusion, I will also note that our holding relating to judicial

arbitrariness, while currently the law of our circuit, must be read in light of the Supreme Court's subsequent cases.

I would order a recall of our mandate to reconsider our second en banc decision.

APPENDIX B

[Filed September 18, 1990]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON,	)	
	)	No. 84-2069
Petitioner-Appellant,	)	
	)	
vs.	)	D.C. No. Civ 83-2323
	)	
JAMES G. RICKETTS, Director, Arizona Department of Corrections,	)	ORDER
	)	
Respondents-Appellees.	)	

Before: HUG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON, BOOCHEVER, NORRIS, BEEZER, BRUNETTI, AND THOMPSON, Circuit Judges.

The parties are requested to file simultaneous briefs 14 days from the filing of this order. The case of Bryant v. Ford, 886 F.2d 1526, 1528-29 (9th Cir. 1989) holds that a panel has the power to recall its mandate to prevent injustice or to protect the integrity of its process and that the same standard applies to staying its mandate after denial of certiorari by the Supreme

Court. The parties should address the question of the applicability of this precedent and whether the circumstances of this case warrant such a procedure. The briefs should also address the effect that the pertinent recent Supreme Court rulings may have upon the issues in this case.

Oral argument will be heard at 1:30 p.m., November 13, 1990 at 100 McAllister Street, Third Floor, in San Francisco.

APPENDIX C

[Dated October 2, 1990]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-2069

JOHN HARVEY ADAMSON,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM
	)	THE UNITED STATES
-vs-	)	DISTRICT COURT
	)	FOR THE DISTRICT
JAMES G. RICKETTS,	)	OF ARIZONA, NO.
Director, Arizona	)	CIV 83-2323 PHX (CAM)
Department of	)	
Corrections; and	)	
DONALD WAWRZASZEK,	)	
Superintendent of	)	
the Arizona State	)	
Prison,	)	
	)	
Respondents-Appellees.	)	
	)	

RESPONDENTS-APPELLEES' SUPPLEMENTAL BRIEF
ON THE MOTION FOR REHEARING EN BANC

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ARGUMENTS

I

THIS COURT HAS THE INHERENT POWER TO STAY THE MANDATE AND EXCEPTIONAL CIRCUMSTANCES WARRANT USE OF THAT POWER TO PROTECT THE INTEGRITY OF THE COURT'S PROCESSES, PREVENT INJUSTICE, AND PROVIDE GUIDANCE TO THE LOWER COURTS.

A. Inherent Power To Stay the Mandate.

This Court in Bryant v. Ford Motor Co., 886 F.2d 1526, 1528-29 (9th Cir. 1989), recognized its inherent power to recall or stay a mandate, even after the Supreme Court has denied certiorari, if exceptional circumstances justify that action. This Court has said that it will exercise that power to prevent injustice and ensure fairness. Zipfel v. Halliburton Co., 861 F.2d 565, 567-68 (9th Cir. 1988). Particularly pertinent to these proceedings is this Court's previous acknowledgment that a Supreme Court case overruling a decision from this Court is the exceptional case:

> When a decision of the Supreme Court "departs in some pivotal aspects" from a decision of a federal appeals court, recall of a mandate may be warranted to the extent necessary "'to protect the integrity'" of the court of appeals' prior judgment. American Iron and Steel, 560 F.2d at 596. Modification of a prior judgment also promotes uniformity in judicial decisionmaking and in the treatment of litigants. Id. at 597-98.
>
> The recent Supreme Court decision in Chick Kam Choo departs in a pivotal aspect from our decision of the injunction issue in this case. The effect of this departure is to overrule our resolution of the injunction issue, at least in part. We, therefore, exercise our power to recall the mandate and amend the opinion "[b]ecause of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice...." Verrilli, 557 F.2d at 665.

Zipfel v. Halliburton Co., 861 F.2d 565, 567-68 (9th Cir. 1988) (emphasis supplied).

If this Court found exceptional circumstances in Bryant and Zipfel -- neither of which was an en banc decision

or a death penalty case -- surely this case, which directly affects the death penalty statutes of several states within this Court's jurisdiction, is an exceptional case. Further proof of this is that the Court granted petitioner's motion for rehearing en banc and has twice heard this case en banc. According to Rule 35(A), Federal Rules of Appellate Procedure, that is not favored and is not done except when en banc consideration is necessary to maintain uniformity of decisions, or when the proceeding involves a question of exceptional importance. Thus, en banc consideration per se has already distinguished this case from the ordinary.

Even more important, however, is the fact that the United States Supreme Court, in two decisions issued the same day, has "departed in pivotal aspects" from this Court's decisions in two death penalty cases from Arizona. The United

States Supreme Court made it clear that it granted review in one case precisely because the defendant relied upon the same constitutional reasons given by this Court to invalidate petitioner's death penalty:

> Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, see Adamson v. Ricketts, 865 F. 2d 1011 (1988) (en banc), we granted certiorari, 493 U. S. ___ (1989), to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty.

Walton v. Arizona, 496 U.S. ___, ___, 110 S. Ct. 3047, 3054 (1990) (emphasis supplied). It is beyond question that, insofar as the constitutional bases relied upon by this Court to strike down the Arizona statute, the Supreme Court used Walton as a vehicle to review those and disagreed with this Court on every

point.[1] The practical effect of that is to overrule this Court's decision. The Supreme Court's decision the same day in Lewis v. Jeffers, 496 U.S. ___, 110 S. Ct. 3092 (1990), makes it doubly clear that the Supreme Court has found the especially heinous, cruel, or depraved factor acceptably defined in Arizona and has limited federal review to whether any reasonable fact-finder could have found it to exist. That, too, is diametrically opposed to the majority opinion in this case and creates a new standard of review not employed in this case.

---

1. Respondents realize that this Court granted relief on two other grounds, alleged prosecutorial vindictiveness and capricious sentencing to death. However, Alabama v. Smith, 490 U.S. ___, 109 S. Ct. 2201 (1989), and Teague v. Lane, 489 U.S. ___, 109 S. Ct. 1060 (1989), which were decided after this Court denied respondents' motion for rehearing, are persuasive authority for reconsidering those two points.

Finally, we come to integrity of the judicial process and fairness to other litigants similarly situated. Because this concerned the Court in non-death cases, Bryant and Zipfel, it surely is of paramount importance where life is at stake. Now that the Supreme Court has ruled upon key questions involving the death penalty, it is appropriate for this Court to rehear this case and apply the principles announced in those new cases because there are seven states in this circuit that have death penalty statutes.[2] If this Court lets its present opinion stand, district courts in all seven states are faced with choosing between this Court's decision and the United State's Supreme Court's decisions in Walton, Jeffers, and Teague. That will produce chaos and results

---

2. Two of those, Montana and Idaho, have judge sentencing and are very similar to Arizona.

inconsistent with the decisions of the Supreme Court.

Perhaps the most grievous complaint other prisoners on death row will have is that petitioner will have escaped the death penalty for reasons rejected by the Supreme Court simply because, by one vote, that court denied certiorari. For all the other residents of death row, that denial of certiorari is meaningless because Walton and Jeffers will govern the disposition of their identical attacks -- and will defeat them. Thus, other things being equal, 88 inmates in Arizona may be executed with no hope of obtaining relief by using the same arguments this Court has accepted to grant one inmate relief. That is not equal treatment under the law and does not foster respect for the integrity of the judicial process.

This case does not affect only petitioner. Many other lives are at

stake. It is not fair to them to permit petitioner to avoid the death penalty for reasons the United States Supreme Court has held invalid. To protect the integrity of the judicial process, ensure fairness, and give guidance to the lower courts, this Court should stay the mandate, grant rehearing before the full court, and apply the correct principles of law to this case.

II

EFFECT OF NEW DECISIONS UPON THE ISSUES IN THIS CASE.

A. No Sixth Amendment Right to Jury Determination of Aggravating Circumstances.

By a vote of 8 to 1, the Supreme Court disagreed with Walton's contention, which merely echoed petitioner's complaint before this Court, that aggravating circumstances in Arizona are actually "elements of capital murder" instead of sentencing factors. Because they are standards to guide the sentencer in

choosing the appropriate penalty, there is no constitutional right to have a jury decide them. 496 U.S. at ___, 110 S. Ct. at 3054-55. Thus, this Court erred in granting relief on this basis and should now correct that error.

B. No Eighth Amendment Violation by Requiring the Defendant To Prove Mitigation by a Preponderance of the Evidence.

As a separate basis for relief, this Court held that Arizona could not, without violating the Eighth Amendment, require petitioner to establish mitigation by a preponderance of the evidence. Adamson v. Ricketts, 865 F.2d 1011, 1039-41 (9th Cir. 1988) (en banc), cert. denied, sub nom, Lewis v. Adamson, ___ U.S. ___, 110 S. Ct. 3287 (1990). The Supreme Court disagreed with that identical contention in Walton. 496 U.S. at ___, 110 S. Ct. at 3055-56. Because this plainly conflicts with this Court's resolution of that question, this

Court should grant rehearing and correct its error.

C. No Unconstitutional Presumption of Death in the Arizona Statute.

This Court also found the Arizona statute flawed because it provides that the sentencer shall impose death if the state proves one or more aggravating circumstances and the defendant cannot produce substantial mitigation. 865 F.2d at 1041-44. Disagreeing with that, the Supreme Court relied upon its recent decisions in Blystone v. Pennsylvania, 494 U.S. ___, 110 S. Ct. 1078 (1990), and Boyde v. California, 494 U.S. ___, 110 S. Ct. 1190 (1990). The Pennsylvania statute required imposition of the death penalty if aggravating circumstances were found, but there was no mitigation. The California statute directed the jurors to impose death if they concluded that the aggravation outweighed the mitigation. 496 U.S. at ___, 110 S. Ct. at 1056.

This holding clashes head on with this Court's opinion. This Court should seize the opportunity to correct this misinterpretation by granting rehearing.

D. The Supreme Court Has Held That Arizona Has Acceptably Narrowed the Applicability of Its Especially Heinous, Cruel, or Depraved Circumstance.

A majority of this Court held this circumstance unconstitutionally vague on its face and concluded that the Arizona Supreme Court had failed to adopt a satisfactory limiting construction. 865 F.2d at 1029, 1038. On the other hand, a panel of this Court in Chaney v. Lewis, 801 F.2d 1191, 1195-96 (9th Cir. 1986), cert. denied, 481 U.S. 1023 (1987), held that the Arizona Supreme Court had "sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions." 801 F.2d at 1195. Although the en banc Court in this case disagreed

with Chaney, and was not bound by it, it is important to realize that another panel in Jeffers v. Ricketts, 832 F.2d 476, 482-86 (9th Cir. 1987), did agree with the Chaney panel. However, two members of the Jeffers panel proceeded to engage in a proportionality review, comparing the facts of other Arizona cases to the facts of Jeffers' case. Having done so, two judges decided that the facts did not warrant application of the circumstance and reversed Jeffers' death penalty. 832 F.2d at 846-87. Dissenting in part, Judge Wilson stated that the majority was doing "little more than second-guessing the Arizona Supreme Court." Id. at 487. He believed that the proper standard of review was whether any rational fact-finder could have found the circumstance to exist, and that the case-by-case analysis undertaken by the majority was not necessary. Id. at 488, 491. The United States Supreme Court

reversed the Ninth Circuit, using essentially the reasoning presented by Judge Wilson in his dissent. Lewis v. Jeffers, 496 U.S. ___, 110 S. Ct. 3092 (1990).

It is essential to read the Supreme Court decision in Jeffers with Walton because Jeffers cites to Walton several times and removes any objection that either case was limited solely to its facts. Walton's contention was that the especially heinous, cruel, or depraved circumstance, as interpreted by the Arizona courts, failed to channel the sentencer's discretion. 496 U.S. at ___, 110 S. Ct. at 3056-57. The Supreme Court said:

> When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to

> determine whether the state courts have further defined the vague terms and if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide some guidance to the sentencer. In this case there is no serious argument that Arizona's "especially heinous, cruel or depraved" aggravating factor is not facially vague. But the Arizona Supreme Court has sought to give substance to the operative terms, and we find that its construction meets constitutional requirements.

Walton v. Arizona, 496 U.S. at ___, 110 S. Ct. at 3057 (emphasis supplied). That Court went on to consider the definitions given and applied by the Arizona Supreme Court and approved them. Id. at 3058. It then turned to Walton's challenge that the circumstance had been applied arbitrarily to him:

> In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we

> "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed-and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment."

Id. The Supreme Court's opinion in Jeffers cited to Walton to make it absolutely clear that Walton settled the issue of alleged lack of guidance to the sentencer in applying this circumstance. 496 U.S. at ___, 110 S. Ct. at 3100-01. That Court pointed out the error committed by the Jeffers majority in conducting a de novo case-by-case comparison:

> Our decision in Walton thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting ... the sentencer's discretion in imposing the death penalty," Cartwright, 486 U.S., at 362, 108 S.Ct., at 1858, has been satisfied. Apart from its analysis of Arizona's subsec. (F)(6) cases to determine whether

> the aggravating circumstance was facially valid--i.e., whether the Arizona courts had given a sufficiently narrow limiting construction to the circumstance--the Court of Appeals in this case therefore erred in conducting a de novo, case-by-case comparison of the facts of those cases with the facts of the instant case. See McCleskey v. Kemp, 481 U.S. 279, 306-307, 107 S.Ct. 1756, 1774-1775, 95 L.Ed.2d 262 (1987) ("[A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty").

496 U.S. at ___, 110 S. Ct. at 3101-02 (emphasis in original). Thus, in the forum of federal habeas corpus, the Supreme Court viewed Jeffers' claim as a complaint that the state court had misapplied the circumstance to the facts of his case -- an error of state law. Id. That, said the Supreme Court, was reviewable only under the reasonable fact-finder standard proposed by Judge

Wilson in his dissent in this Court's opinion in Jeffers. Id. at 3102-03. That Court cautioned federal courts not "to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts." Id. at 3102. A state court's finding of an aggravating circumstance -- including a de novo finding by an appellate court -- is arbitrary and capricious "if and only if no reasonable sentencer could have so concluded." Id. at 3103. Applying this new standard, the Supreme Court reversed. Id. at 3104.

Walton and Jeffers announced two critical principles: (1) The Arizona Supreme Court has acceptably limited the especially heinous, cruel, or depraved circumstance; (2) the standard of review in the federal courts in whether any reasonable fact-finder, viewing the evidence in the light most favorable to

the prosecution, could have found it to exist.

If this Court properly applies these two principles to this case, it must leave intact the Arizona Supreme Court's finding that the murder was especially cruel. There is no question that Don Bolles was conscious after the bomb exploded under his driver's seat, nor is there any doubt that he consciously suffered excruciating pain:

> The victim clearly suffered in the instant case. Witnesses who were inside buildings hundreds of feet from the explosion testified that they heard Bolles screaming for help. Bolles had particles from the bomb imbedded in his body. One leg was shattered from the upper hip to his ankle and had the appearance of hamburger. The other leg and one arm were also severely mutilated. The force of the explosion sent a piece of flesh the size of a softball across the parking lot. The means used to kill Bolles made it reasonably foreseeable to Adamson that if Bolles did not die instantaneously there was a substantial likelihood that he would suffer a great deal from his injuries. We therefore find that the murder was accomplished in an

> especially cruel manner and that the trial court properly found the aggravating circumstances under subsection (F)(6) of the statute.

State v. Adamson, 136 Ariz. 250, 266-67, 665 P.2d 972, 988-89, cert. denied, 464 U.S. 865 (1983).[3] Thus, the four dissenters in this Court's en banc opinion were correct when they determined that the Arizona Supreme Court had properly limited the definition of especially cruel and that the facts of this case sustained application of that circumstance. 865 F.2d at 1055-56. To follow Lewis v. Jeffers, this Court must view the evidence in the light most favorable to the state and may set aside the Arizona Supreme Court's finding "if and only if no reasonable sentencer could have so concluded." 110 S. Ct. at 3103.

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3. The evidence at trial showed that Bolles spoke to rescuers and remained conscious at least a day after the bombing. He lingered for 11 days and had three limbs amputated. Id. at 253, 665 P.2d at 975.

Petitioner cannot show that. This Court should grant rehearing and reverse itself on this point.

E. In Two Separate Instances, This Court Has Announced A "New Rule" And Applied It In This Collateral Proceeding To Grant Relief; Teague V. Lane Forbids That And Petitioner Does Not Fall Within Either Of The Two Exceptions.

As separate bases for granting relief, this Court indulged in a presumption of prosecutorial vindictiveness -- placing the burden upon the prosecution to rebut that presumption at an evidentiary hearing -- and held (by a 6 to 5 vote) that it was arbitrary and capricious for the same judge who sentenced petitioner for second degree murder under the plea agreement to sentence him to death after a jury convicted him of first degree murder following his breach of the plea agreement. In both instances the majority has announced a new constitutional rule of criminal procedure and applied it in a collateral proceeding

long after petitioner's conviction became final in 1983. Supreme Court precedent not available until after this Court denied respondents' original motion for rehearing February 1, 1989, forbids a federal court to do that. Therefore, it is of utmost importance that this Court take into account these new cases, properly apply them, and reverse itself.

1. Teague v. Lane and Its Progeny

The watershed case that announced the "new rule" limitation, and forbad its application to collateral proceedings, was Teague v. Lane, 489 U.S. ___, 109 S. Ct. 1060 (1989), decided 2 weeks after this Court denied respondents' original motion for rehearing. Teague asked the Supreme Court to extend the fair cross-section requirement of Taylor v. Louisiana, 419 U.S. 522 (1975), to the petit jury. Before it would announce a new rule, the Supreme Court said it had to determine whether such a rule would

apply retroactively. 109 S. Ct. at 1070. Then the Supreme Court said what it meant by a "new rule":

> In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Id. (emphasis in original). Adopting Justice Harlan's view of retroactivity for cases on collateral review, the Supreme Court held that it would not apply new constitutional rules of criminal procedure to cases that had become final unless the new rule fit into one of two exceptions. The first exception was a new rule that placed certain kinds of primary, private individual conduct beyond the power of the law-making authority to proscribe. Id. at 1075. The second exception, which concerns those procedures "implicit in

the concept of ordered liberty," the Supreme Court adopted with a modification:

> In Desist, Justice Harlan had reasoned that one of the two principal functions of habeas corpus was "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted," and concluded "from this that all 'new' constitutional rules which significantly improve the pre-existing factfinding procedures are to be retroactively applied on habeas." 394 U.S., at 262, 89 S.Ct., at 1041.
>
> . . . .
>
> We believe it desirable to combine the accuracy element of the Desist version of the second exception with the Mackey requirement that the procedure at issue must implicate the fundamental fairness of the trial.
>
> . . . .
>
> Moreover, since Mackey was decided, our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review.
>
> . . . .
>
> Finally, we believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of

> accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.
>
> Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.

Id. at 1076-77 (emphasis supplied).

The new rule limitation applies to capital cases. Penry v. Lynaugh, 492 U.S. ___, 109 S. Ct. 2934, 2944 (1989). Butler v. McKellar, ___ U.S. ___, 110 S. Ct. 1212 (1990), provided insight into those situations where, even if a court's decision did not "break new ground" or "impose a new obligation," it might still run afoul of Teague. That a court may say that its decision is merely an extension of the reasoning of previous cases, is not conclusive for purposes of deciding whether the current decision is a new rule under Teague. 110 S. Ct.

at 1217. A prime example is Butler, a capital case. He sought the benefit of Arizona v. Roberson, 486 U.S. 675 (1988), decided after his conviction became final. He contended that Roberson was not a new rule, but merely an application of Edwards v. Arizona, 451 U.S. 477 (1981), to a slightly different set of facts. 110 S. Ct. at 1217. Rejecting that, the Court said:

> But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In Roberson, for instance, the Court found Edwards controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. 486 U.S., at 679, n. 3, 108 S.Ct., at 2097, n. 3. That the outcome in Roberson was susceptible to debate among reasonable minds is evidenced

> further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson. We hold, therefore, that Roberson announced a "new rule."

Id. at 1217-18 (emphasis supplied). Finding that a violation of the additional restrictions of Roberson was more likely to increase, rather than diminish, the accuracy of a conviction, the Supreme Court refused to apply it to Butler. Id.

The Supreme Court has continued to apply this rule in capital cases on collateral review. Robyn Parks maintained that an instruction telling the jurors to avoid the influence of sympathy violated the Eighth Amendment and was not a new rule, just an extension of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Reviewing the criteria set forth

in Teague and Butler, the Supreme Court disagreed. The Supreme Court emphasized that the question whether the defendant sought a new rule must be considered "by reference to the underlying purposes of the habeas writ." Saffle v. Parks, ___ U.S. ___, 110 S. Ct. 1257, 1260 (1990). Foremost among those purposes was assuring that the state courts had conducted the proceedings in accordance with the Constitution as interpreted at the time of those proceedings. Id. Even if the Supreme Court agreed that Lockett and Eddings governed the analysis of Parks' claim, "it does not follow that they compel the rule that Parks seeks." Id. at 1261. The Court concluded that neither Lockett, Eddings, nor Penry compelled the new rule Parks sought and, because he satisfied neither of the two exceptions of Teague, the Supreme Court would not apply a new rule to his case. Id. at 1263-64.

In another death penalty case, Sawyer v. Smith, ___ U.S. ___, 110 S. Ct. 2822 (1990), the Supreme Court reached the same conclusion. Sawyer's conviction became final before the Supreme Court decided Caldwell v. Mississippi, 472 U.S. 320 (1985). The Supreme Court agreed that Caldwell announced a new rule, but refused to apply it to Sawyer because it did not come within Teague's exception "for watershed rules fundamental to the integrity of the criminal proceeding." 110 S. Ct. at 2824-25. Again the Supreme Court stressed that the purpose of federal habeas is not to provide a mechanism for the continual re-examination of final judgments, but to ensure that those convictions comported with federal law in existence at the time. Id. at 2827.

Teague and its progeny make it clear that, in two instances, this Court has created and applied new rules within the

meaning of Teague and in neither instance does the new rule satisfy either of the exceptions in Teague.

2. Alleged Prosecutorial Vindictiveness

A majority of this Court held that a presumption of vindictiveness was warranted because the state sought the death penalty for the same conduct to which it earlier permitted petitioner to enter a plea to second-degree murder, and because the state refiled the original charge after petitioner invoked the Fifth Amendment at a bond reduction hearing prior to the anticipated retrial. 865 F.2d 1011, 1018-19. Under Teague, a court announces a new rule when it breaks new ground, imposes a new obligation on the state, or when it reaches a result not dictated by precedent existing at the time of the defendant's conviction. 109 S. Ct. at 1070. This Court's majority opinion cites no Supreme Court case dictating a presumption of vindictiveness

under these circumstances. That reasonable minds could differ about whether such a presumption was warranted is evidenced by the four dissenters here, and the three-judge panel that dismissed this contention originally in Adamson v. Ricketts, 758 F.2d 441, 449 (9th Cir. 1985). Thus, an equal number of judges of this Court have found no valid constitutional basis for indulging in that presumption. It is therefore impossible to say that existing Supreme Court precedent dictated the result reached by the majority. A decision that is susceptible to debate among reasonable minds is a strong indication that a court is announcing a new constitutional rule. Butler v. McKellar, ___ U.S. ___, 110 S. Ct. at 1217-18.

Consideration of principles established by United States Supreme Court cases decided before this Court rendered its decision, and one case decided after

that, are persuasive indicators that the Court erred by indulging in a presumption of vindictiveness. It is clear that if petitioner were before this Court arguing that the state was obliged to enter into a plea agreement with him, he would lose because there is no constitutional right to a plea agreement. Weatherford v. Bursey, 429 U.S. 545, 561 (1977). That is exactly the position he was in after he breached by his letter of April 3, 1980, and again by his refusal to cooperate in the pretrial hearings of April 1980. It is equally clear that if, originally, the prosecutor had threatened to pursue a charge of first degree murder and the death penalty unless petitioner pled to second degree murder, that the Constitution would have afforded petitioner no relief if he had insisted upon going to trial, was convicted, and received the death penalty.

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

Although neither Weatherford nor Bordenkircher involved a plea agreement that the defendant breached or successfully overturned on appeal, Alabama v. Smith, 490 U.S. ___, 109 S. Ct. 2201 (1989), decided after this Court denied respondents' first motion for rehearing February 1, 1989, dealt with the latter situation. Smith pled guilty to certain offenses, then upon appeal attacked the voluntariness of his plea. The appellate court set it aside and remanded. The prosecution proceeded to trial on the original charges. Smith was convicted and received an appreciably longer sentence. Now he claimed judicial vindictiveness. A majority of the Alabama Supreme Court agreed with him. But the United States Supreme Court, recognizing the evolution of case law involving guilty pleas, refused to apply

a presumption of vindictiveness to the harsher sentence because the first sentence was imposed under the plea agreement. In so doing, it overruled Simpson v. Rice, the companion case to North Carolina v. Pearce, 395 U.S. 711 (1969):

> With respect, it does not appear that the Court gave any consideration to a possible distinction between the Pearce case, in which differing sentences were imposed after two trials, and the Rice case, in which the first sentence was entered on a guilty plea.
>
> The failure in Simpson v. Rice to note the distinction just described stems in part from that case having been decided before some important developments in the constitutional law of guilty pleas. A guilty plea may justify leniency, Brady v. United States, supra; a prosecutor may offer a "recommendation of a lenient sentence or a reduction of charges" as part of the plea bargaining process, Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 667, 54 L.Ed.2d 604 (1978) and we have upheld the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the

> defendant insists on his right to stand trial, Id.; we have recognized that the same mutual interests that support the practice of plea bargaining to avoid trial may also be pursued directly by providing for a more lenient sentence if the defendant pleads guilty. Corbitt v. New Jersey, 439 U.S. 212, 221-223, 99 S.Ct. 492, 498-499, 58 L.Ed.2d 466 (1978).
>
> Part of the reason for now reaching a conclusion different from that reached in Simpson v. Rice, therefore, is the later development of this constitutional law relating to guilty pleas. Part is the Court's failure in Simpson to note the greater amount of sentencing information that a trial generally affords as compared to a guilty plea. Believing as we do that there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea, we overrule Simpson v. Rice, supra, to that extent.

Alabama v. Smith, 490 U.S. ___, 109 S. Ct. 2201, 2206 (1989) (emphasis supplied).

If Smith, who exercised a recognized constitutional right to question the voluntariness of his plea on appeal, was

not entitled to invoke a presumption of vindictiveness because of the harsher sentence after a trial, petitioner, who did not exercise a protected right, but breached the plea agreement, is certainly not entitled to invoke that presumption. Petitioner did not appeal his agreement, as Smith did. Instead, he announced in his letter of April 3, 1980, that his obligations had ended and he would do nothing more unless the state acceded to nine new demands. That was a breach and the prosecutor's letter of April 9, 1980, pointed that out, as we noted at pages 2-3 of our Supplemental Answering Brief En Banc on Remand from the United States Supreme Court (filed Sept. 25, 1987). Petitioner had no constitutional right to do that. He continued to breach by invoking the Fifth Amendment in a pretrial hearing in April 1980. It makes no difference that Judge Myers allowed him to invoke the Fifth Amendment because

he did it to protect himself from the consequences of his breach, consequences he acknowledged in his letter of April 3, 1980.[4] There is no United States Supreme Court case holding that a defendant who does that is exercising a "protected right" that the Supreme Court would recognize as warranting a presumption of vindictiveness. It is the law of the case that petitioner breached, a finding left undisturbed by the United States Supreme Court in Ricketts v. Adamson, 483 U.S. 1 (1987).

A majority of this Court has not given due regard to the existence and

---

4. The Court should remember that Judge Myers did not construe the plea agreement to determine the extent of petitioner's obligations under it even though the state asked him to do that. Petitioner's counsel opposed that request and, when counsel discovered that the prosecution was asking the Arizona Supreme Court to interpret the agreement, defense counsel unsuccessfully attempted to withdraw his special action. After a hearing, the Arizona Supreme Court found petitioner in breach and reinstated the original charge. State v. Adamson, 125 Ariz. 579, 580, 611 P.2d 932, 933 (1980).

importance of the plea agreement. In paragraphs 5 and 15, petitioner, counseled by three attorneys, agreed that the original charge would be reinstated automatically and the state could pursue the death penalty if he breached the agreement. These terms were negotiated with the advice of multiple counsel at petitioner's disposal. Both sides were fully aware of the benefits of the agreement and the consequences of breaching it. It is settled law that petitioner voluntarily and intelligently entered into this agreement, fully realizing the consequences of a breach, and waived double jeopardy when he breached the agreement. Ricketts v. Adamson, 483 U.S. 1 (1987). Petitioner did not seek any other restriction upon the state's right to pursue the original charge in case he breached. The agreement contained only one precondition in the automatic reinstatement

provision: breach of the agreement. It is appropriate to remember what the Supreme Court said:

> Finally, it is of no moment that following the Arizona Supreme Court's decision respondent offered to comply with the terms of the agreement. At this point, respondent's second-degree murder conviction had already been ordered vacated and the original charge reinstated. The parties did not agree that respondent would be relieved from the consequences of his refusal to testify if he were able to advance a colorable argument that a testimonial obligation was not owing. The parties could have struck a different bargain, but permitting the State to enforce the agreement the parties actually made does not violate the Double Jeopardy Clause.

Ricketts v. Adamson, 483 U.S. at ___, 107 S. Ct. at 2687. The Supreme Court found the plea agreement controlling on the double jeopardy issue. The same reasoning is also controlling upon the issue of alleged vindictiveness.

The automatic reinstatement provisions of the plea agreement, which returned the parties to the status quo before the

agreement, put the parties back into a pre-agreement setting once petitioner breached. 107 S. Ct. at 2686. In that context, Supreme Court precedent dictated the result reached by the dissent here, not the majority:

> In [the prosecutorial vindictiveness cases] the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction--a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power."

Bordenkircher v. Hayes, 434 U.S. 357, 362, (emphasis supplied), quoting Parker v. North Carolina, 397 U.S. 790 (1970). Once petitioner breached, he had no right to demand that the prosecution offer him the same agreement again because he had no right to that agreement in the first place. Nor did he have the right to require that the state provide some additional authority for prosecuting him

on the original charge because he agreed to the automatic reinstatement provision if he breached.

There is no Supreme Court case holding that when a defendant has agreed to an automatic reinstatement provision, then breaches the agreement and triggers that provision, that a court may simply ignore the clear terms of the agreement and impose a new obligation upon the prosecution to rebut a presumption of vindictiveness for doing what the defendant, assisted by three attorneys, agreed the state could do.

This Court's conclusion about a presumption of vindictiveness was not dictated by Supreme Court precedent and cannot be reconciled with Alabama v. Smith. This Court has so far permitted the breaching party to avoid the consequences of his deliberate actions by imposing upon respondents a presumption of vindictiveness requiring an

evidentiary hearing. That result is contrary to precedent and imposes an additional obligation upon the state -- in violation of Teague. Moreover, this new rule does not fall within either of the Teague exceptions. It certainly does nothing to enhance the accuracy of the determination of guilt. The Court has erred and should correct the error. If the Court does not, then upon remand for an evidentiary hearing, the District Court will have to consider Alabama v. Smith and the Teague line of cases, all decided after this Court's decision in December 1988. That would put the District Court in a very difficult position and this Court can avoid that by properly applying the law at this level.

3. Arbitrary and Capricious Sentencing

The Court rejected the claim that the trial court vindictively sentenced petitioner to death after his conviction for first degree murder, but agreed that

the trial court arbitrarily sentenced him to death. The Court gave two reasons: (1) the trial judge had learned nothing new about the case from the time he sentenced petitioner under the plea agreement; (2) the trial judge earlier found that the stipulated term of years under the plea was an appropriate penalty. That, too, violated Teague v. Lane because it was not dictated by any case cited by the majority nor does logic support it. In fact, a proper reading of Supreme Court precedent dictates the result reached by the minority.

The Supreme Court cases that have examined sentencing procedures in death cases have never held that sentencing a defendant to death was arbitrary or capricious simply because he had received a different, stipulated sentence in a plea agreement involving a lesser charge. The Supreme Court's concern has been that the sentencer's discretion be

guided by criteria that argue for and against the death penalty, and that a defendant not be restricted in the presentation of mitigation. Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153, 189, 195 (1976); Proffitt v. Florida, 428 U.S. 242, 251-53 (1976). If the sentencing process contains sufficient safeguards to ensure that death has not be capriciously imposed, the Constitution requires nothing more. Walton v. Arizona, 110 S. Ct. at 3058.

Although the Court found the Arizona death statute flawed in several ways -- which Walton effectively overrules -- the Court did not, in analyzing this issue, discuss or rely upon any of those supposed deficiencies to find that the death penalty had been arbitrarily imposed. However, if any of those conclusions contributed to the Court's holding on this point, then the Court

should be especially careful to re-examine its rationale because Walton has eliminated those other factors. The Court's holding rests upon the premise that a trial court that has essentially the same information may not sentence a defendant to a term of years under a plea agreement to a lesser charge, then later sentence him to death after the jurors have convicted him of first degree murder and the state has proved two aggravating circumstances beyond a reasonable doubt.[5] But the Court's rationale has nothing to do with arbitrary or capricious sentencing as the Supreme Court has described those concepts in death penalty cases.

The Court indicated that the trial judge originally had the option of

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5. Petitioner has never questioned the applicability of A.R.S. § 13-703(F)(5), pecuniary gain, to him. 865 F.2d at 1029 n.33.

rejecting the plea agreement, or at least the sentencing provision, but did not do so. 865 F.2d at 1022. Unless the Court tacitly was considering some kind of estoppel theory, or a double jeopardy barrier, we cannot understand in what manner that rendered a later sentence, after conviction for a greater offense, arbitrary. The Court seems to be saying that once a trial judge accepts a plea to a stipulated sentence, he may never impose a harsher sentence, even upon a subsequent conviction for first degree murder, unless, in the interim, he has received additional information about the defendant. That sounds like the vindictiveness cases -- but the Court found no evidence of judicial vindictiveness. There is no Supreme Court authority for applying estoppel or arbitrariness in these circumstances.

Every plea agreement by definition is a compromise -- that is the inducement to

the defendant, who would prefer not to risk trial on the more serious charge. Sentencing concessions are at the heart of a plea bargain. Mabry v. Johnson, 467 U.S. 504, 508 (1984). In Alabama v. Smith, 490 U.S. ___, 109 S. Ct. 2201, 2206 (1989), the Supreme Court also recognized that a trial judge is operating in one context when he accepts a guilty plea and another when he sentences after presiding over a full trial on the merits:

> In the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Supra, at 2203. See United States v. Grayson, 438 U.S. 41, 53, 98 S.Ct. 2610, 2617, 57 L.Ed.2d 582 (1978) (sentencing authority's perception of the truthfulness of a defendant testifying on his own behalf may be considered in sentencing). Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present. See Brady v. United States, supra, 397 U.S.,

> at 752, 90 S.Ct., at 1471. Here, too, although the same Judge who sentenced following the guilty plea also imposes sentence following trial, in conducting the trial the court is not simply "do[ing] over what it thought it had already done correctly." Colten, supra, 407 U.S., at 117, 92 S.Ct., at 1960. Each of these factors distinguishes the present case, and others like it, from cases like Pearce. There, the sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness. In cases like the present one, however, we think there are enough justifications for a heavier second sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by vindictiveness.

(Emphasis supplied.) The dissent in this case applied the same reasoning to the claim of arbitrariness and rejected it. 865 F.2d at 1049-52.

That the trial judge here was willing to make sentencing concessions in view of the mutual benefits to the state and petitioner reflected only the reality of

the plea bargaining process. Judge Birdsall had those matters in mind when he accepted the plea to second degree murder and a stipulated sentence. Whatever facts he knew from a preliminary hearing transcript and police reports did not compare to observing the testimony of live witnesses at the trial for first degree murder -- witnesses who testified about Bolles' suffering at the scene and later, petitioner's pecuniary motive for planting the bomb, his boast about having other contracts lined up, and the steps he took to procure the parts and construct the bomb. Within the context of the plea to second degree murder, the trial judge had no legal reason to consider possible aggravating factors under A.R.S. § 13-703(F) because those apply only to capital cases. Moreover, the parties had stipulated to a sentence. Once petitioner breached the agreement and proceeded to a full trial

on the merits, however, the trial court was sentencing for a different conviction that required different considerations. A.R.S. § 13-703(E) mandated that he take into account specified aggravating circumstances and any mitigation petitioner could produce. He did that and found two aggravating circumstances. That same statute directed him to impose death unless petitioner could show mitigation sufficiently substantial to call for leniency. After an aggravation-mitigation hearing, the trial judge concluded that the mitigation was not substantial enough to warrant a life sentence. All of that was done in accordance with procedures that had no pertinence to the plea agreement. And the Supreme Court in Walton has said that there is no constitutional infirmity in those procedures.

To find the sentencing here arbitrary and capricious runs contrary to Supreme

Court precedent and creates a new rule violative of Teague v. Lane. The Court should grant rehearing and reverse its decision on this point.

CONCLUSION

In order to be fair to litigants similarly situated, to promote uniformity of decisions, and to give guidance to the lower courts, this Court should grant rehearing. On four of the six issues the United States Supreme Court has said unequivocally that the Court was incorrect. On the other two, neither old nor new precedent dictated the result reached by the majority. Supreme Court cases decided after denial of respondents' motion for rehearing make it plain that a federal court may not impose new obligations or new rules in a collateral proceeding. Respondents respectfully ask the Court to grant

rehearing and to issue a new opinion correcting these errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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HC5-177/4866D/drl (M)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 84-2069

JOHN HARVEY ADAMSON,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM
	)	THE UNITED STATES
-vs-	)	DISTRICT COURT
	)	FOR THE DISTRICT
JAMES G. RICKETTS,	)	OF ARIZONA, NO.
Director, Arizona	)	CIV 83-2323 PHX (CAM)
Department of	)	
Corrections; and	)	
DONALD WAWRZASZEK,	)	
Superintendent of	)	
the Arizona State	)	
Prison,	)	
	)	
Respondents-Appellees.	)	
_____	)	

Richmond v. Ricketts, No. 86-2382,

Jeffers v. Ricketts, No. 86-1840, and

Mata v. Ricketts, No. 87-1731 involve

some of the issues raised in this case.

DATED this 2nd day of October, 1990.

Respectfully submitted,

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APPENDIX D

[Dated January 11, 1991]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-2069

JOHN HARVEY ADAMSON,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM
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-vs-	)	DISTRICT COURT
	)	FOR THE DISTRICT
JAMES G. RICKETTS,	)	OF ARIZONA, NO.
Director, Arizona	)	CIV 83-2323 PHX (CAM)
Department of	)	
Corrections; and	)	
DONALD WAWRZASZEK,	)	
Superintendent of	)	
the Arizona State	)	
Prison,	)	
	)	
Respondents-Appellees.	)	
	)	

RESPONDENTS-APPELLEES' MOTION TO VACATE JUDGMENT AND DISMISS APPEAL AS MOOT

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 84-2069

JOHN HARVEY ADAMSON,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM
	)	THE UNITED STATES
-vs-	)	DISTRICT COURT
	)	FOR THE DISTRICT
JAMES G. RICKETTS, Director, Arizona Department of	)	OF ARIZONA, NO. CIV 83-2323 PHX (CAM)
Corrections; and	)	MOTION TO VACATE
DONALD WAWRZASZEK, Superintendent of	)	JUDGMENT AND DISMISS APPEAL AS MOOT
the Arizona State Prison,	)	
	)	
Respondents-Appellees.	)	

Because of developments occurring after respondents moved for rehearing and after this Court heard oral argument on that motion on November 13, 1990, respondents respectfully move the Court to vacate the judgment of December 22, 1988, and to dismiss Adamson's appeal as moot.

DATED this 11th day of January, 1991.

Respectfully submitted,

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SUBSEQUENT DEVELOPMENTS

On December 19, 1990, Adamson and respondents entered into a "Stipulation and Cooperation Agreement," which Adamson attached as an exhibit to his state petition for post-conviction relief filed that same date. This Court has requested, and respondents have provided, copies of these documents. Essentially, that agreement provides that, if Adamson testifies truthfully in the upcoming trials of Max Dunlap and James Robinson, respondents will join in his motion to set aside the conviction for first degree murder, and the death penalty, and permit him to plead guilty to second degree

murder, thus reactivating the original plea agreement of January 15, 1977, and his sentence under that agreement. (Stipulation and Cooperation Agreement at 3-4.) This, of course, is precisely the relief that Adamson has been seeking from this Court.

ABSENCE OF A CASE OR CONTROVERSY

Because of this dramatic turnabout in events, respondents maintain that now there is no case or controversy for this Court to decide. The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, not merely on the date the action was initiated. Roe v. Wade, 410 U.S. 113, 124-25, 93 S. Ct. 705, 712, 35 L. Ed. 2d 147, 161 (1973). Under article III of the Constitution, federal courts are not empowered to consider hypothetical or abstract cases, or to issue advisory opinions. Sibron v. New York, 392 U.S.

40, 57, 88 S. Ct. 1889, 1900, 20 L. Ed. 2d 917, 931 (1968). A federal court is without authority to decide moot questions or to issue advisory opinions that cannot affect the rights of the litigants before it. St. Pierre v. United States, 319 U.S. 41, 42, 63 S. Ct. 910, 911, 87 L. Ed. 1199, 1201 (1943) (the Supreme Court dismissed as moot the appeal of a defendant who had served his sentence and could not show the possibility of additional penalties or disabilities under state or federal law). Because Adamson will receive the benefits of his original plea agreement, and not be subject to the death penalty or any sentence longer than that imposed under the original agreement, this case is moot and, under article III of the Constitution, there is nothing for the Court to decide. See also DeFunis v. Odegaard, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) (dismissed as

moot after oral argument on Feb. 24, 1974, during DeFunis' last semester at the University of Washington Law School, because respondents agreed that they would do nothing to have him ousted and, if he successfully completed all requirements, he would receive his law degree at the end of that semester).

The mandate has not issued in this case and the judgment of December 22, 1988, has never become final. Especially in view of the supplemental briefing in October 1990 and oral argument November 13, 1990, the Court should consider this matter as pending appeal because the appellate process has not run its course. Because there is no longer a controversy between the parties, there is no case to decide and this Court should vacate the judgment of 1988 and dismiss the appeal as moot.

POWER TO DECLINE DECISION

Even if this Court believes, in spite of the new agreement between Adamson and

respondents, that there is still a justiciable case before it, the Court has the latitude, as a matter of judicial administration, to decline making a decision:

> When events during the pendency of the appeal have eliminated any possibility that the court's order may grant meaningful relief affecting the controversy that precipitated the litigation, applicable doctrine permits, and judicial administration generally calls for, dismissal of the appeal.

Alton & So. Ry. Co. v. International Ass'n of Mach. & A.W., 463 F.2d 872, 877 (D.C. Cir. 1972). This makes good sense in view of the extraordinary change in circumstances. Because Walton v. Arizona, ___ Ariz. ___, 110 S. Ct. 3047 (1990) and Lewis v. Jeffers, ___ U.S. ___, 110 S. Ct. 3092 (1990), rejected four of the six contentions upon which this Court granted relief, the Court would be issuing an opinion upon only two points: (1) prosecutorial vindictiveness and (2) arbitrary sentencing. Neither of

those would afford Adamson any relief he has not already received from reactivation of his original plea agreement to second degree murder. Nor would either be likely to "evade review" if they again appeared in a death penalty case. Thus, it is not necessary to decide any issue in the appeal. To do so, under these dramatically changed circumstances, would be to render an advisory opinion.[1]

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1. Reactivation of the original plea agreement also eliminates the need for an evidentiary hearing on the allegation of vindictiveness.

CONCLUSION

Respondents respectfully move the Court to vacate the judgment of December, 1988 and to dismiss the appeal as moot.

Respectfully submitted,

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